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tiff as to the manner in which the injury occurred. To this ruling the defendant excepted.

A majority of the court are of the opinion, there was a sufficient foundation laid for the introduction of impeaching testimony, and that the defendant had the right to use testimony of Welsh for that purpose, notwithstanding it was taken under a commission at the execution of which the witness sought to be impeached was not examined.

Judgment reversed, and new trial awarded.

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*Supreme Court of Ohio.*

JOHN SWASEY ET AL. v. M. T. ANTRAM ET AL.

Where one of the defendants, in an action on a joint contract, dies before judgment, and the judgment is taken against all the defendants, without any suggestion of his death, or making his representatives parties, such judgment is not void, but merely voidable, and is a determination of the action, within the meaning of sections 218 and 219 of the code, authorizing an action by the plaintiff in attachment against the garnishee.

A married woman has not capacity to enter into a general mercantile partnership not connected with or relating to her separate property, and where she assumes to do so with the consent of her husband, and is by him assisted in managing and carrying on the business, the husband, and not the wife, is to be regarded in law as the partner.

A *feme covert* having obtained a "permit" to trade within the lines of the army, with the knowledge and consent of her husband entered into a partnership with other persons, for the purpose of buying and selling goods and merchandise under said "permit," and herself, with the assistance of her husband, managed and conducted the business. The firm was subsequently dissolved, and its property transferred by the other partners to her, she agreeing to pay all the partnership debts. She then sold the property to S., who had notice of all the facts, and who in like manner agreed to pay the partnership debts. This was all done with the knowledge and concurrence of the husband, who joined her in executing the bill of sale to S. In an action by a creditor of the firm against the husband and the other members of the firm, not including the wife: *Held*, that the goods in the hands of S., or the price agreed by him to be paid therefor, and not yet paid, are liable to attachment in the action.

ERROR to the Superior Court of Cincinnati.

Antram & Co. brought an action against Hazard L. Baldwin and three other named persons, to recover the price of goods alleged to have been sold by Antram & Co. to the defendants, while the latter were doing business as partners under the name of M. J. Baldwin & Co. The suit was commenced by a writ of attachment,

and no personal service was made on the defendants. Process of garnishment was served upon Swasey & Co. charging that they had property of the defendants in their hands, or were indebted to them, and Swasey & Co. answered, denying all indebtedness and liability. Antram & Co. took judgment by default against the defendants in attachment. At the date of this judgment, Hazard L. Baldwin, one of the defendants, was dead, having died after the commencement of the suit; but the plaintiffs being ignorant of the fact, no suggestion of his death was made, nor were his legal representatives made parties. After obtaining their judgment, M. T. Antram & Co., being dissatisfied with the answer of Swasey & Co., brought an action against them (under the 218th section of the Code, S. & C. 1009), charging that they had property in their hands, or were indebted to an amount exceeding the sum so recovered. The cause was submitted to the court upon the pleadings and an agreed statement, which embody substantially the following facts:—

In 1864, Mary J. Baldwin, the wife of said Hazard L. Baldwin, with the assent of her husband, procured a “permit” to trade within the lines of the Federal army, and for that purpose, with like consent, entered into a partnership with the said three other persons so sued as co-defendants with her husband in the attachment suit. The business consisted in buying and selling goods, and was managed principally by her, assisted by her husband. The business was commenced without capital, the goods being purchased on credit, and the claim of M. T. Antram & Co. was a debt due for goods sold to the firm.

In May 1865, the firm of M. J. Baldwin & Co. was dissolved, and its property and effects sold by the other partners to Mrs. Baldwin, she agreeing to pay all the partnership debts. This was done with the consent of her husband; and with like consent, in June 1865, the entire property and effects were sold by her to Swasey & Co., the husband, as well as the wife, signing the bill of sale. Although this bill of sale purports to be an absolute transfer and conveyance, it was in fact intended as a mortgage, to secure a debt due to Swasey & Co. Swasey & Co., however, took the property upon the same terms as did Mrs. Baldwin—that is, they were to pay all the partnership debts, including the debt due to Antram & Co. The property was amply sufficient to pay all the debts. It was not actually delivered to Swasey & Co., at the time of the sale, but was subsequently managed, and sold from time to

time, by Mrs. Baldwin, as agent for Swasey & Co., and the proceeds paid over to them as they came to hand, her husband assisting her in managing the business.

After service of the process of garnishment upon Swasey & Co., the principal part of the debt due to them having been thus paid from the proceeds of the property, the remainder of the property and effects was reconveyed by them to Mrs. Baldwin.

On these facts, the court rendered judgment for the plaintiffs.

*C. D. Coffin, T. G. Mitchell and W. M. Ramsey*, for plaintiffs in error.

*Stanley Mathews and J. F. Baldwin*, for defendants in error.

The opinion of the court was delivered by

WELCH, J.—We are unanimous in the opinion that this judgment should be affirmed, although we differ somewhat as to the ground on which the affirmance ought to be placed.

A majority of the court are of opinion that the husband, Hazard L. Baldwin, and not his wife, under the circumstances, became and was a member of the firm of M. J. Baldwin & Co., at least so far as to make him liable for its debts; that the sale of the partnership effects by the firm, nominally to the wife, was in law a sale to the husband; that the sale to Swasey & Co., nominally by the wife and husband, was in law and in fact a sale by the husband; that Swasey & Co., by their agreement to pay the debts of the firm of M. J. Baldwin & Co., became liable and indebted to Hazard L. Baldwin, one of the defendants in attachment, and therefore liable to the process of garnishment.

This property was in no proper sense the separate estate of the wife, nor was it purchased with her separate property. It does not fall within any of the denominations of property declared by the Act of 1861 (S. & S. 389) to be the separate property of the wife. The “permit” under which the business was carried on was not *property*, in the statutory sense. Besides, she had no capacity to enter into such a contract of partnership, to bind herself to pay for the goods purchased by the firm, or to pay the price stipulated for the goods sold by the firm to her. Her acts in all these matters, being done with the knowledge and concurrence of her husband, must be held in law to be his acts, so far at least as regards his rights and liabilities as between himself and third persons. The promise of Swasey & Co. to pay the debts of the firm was, in

law and under the circumstances, a promise made to the husband, and enforceable by him, if not also by his copartners and codefendants in the action.

But suppose the law were otherwise, and that by her purchase of the goods from her partners, she, and not her husband, became vested with the absolute ownership of the property. I am inclined to hold, as the court below seems to have held, that in that case her promise to pay the debt of the firm, being the promise of a *feme covert*, and therefore a mere nullity, she held the property in the character of trustee or agent, and subject to the fulfilment of her promise; and if so, Swasey & Co., taking the goods of her with knowledge of these facts, and upon a similar promise, held them subject to the same equity or right of reclamation in favor of the other partners of the firm. If we call this a "trust," it would not be a trust in favor of the creditors of M. J. Baldwin & Co., as counsel seem to suppose in their argument, but a trust in favor of M. J. Baldwin & Co., or the retiring members of the firm.

A majority of the members of the court, however, disincline to put the decision of the case upon this ground, and hold, as I have indicated, that the husband, and not the wife, is to be regarded as the real party in these transactions, and the wife as acting in the capacity of his agent.

But it is objected that the judgment in the attachment case was not final, and that, therefore, the suit was not "determined," within the meaning of section 219 of the Code. (S. & C. 1009.) The judgment, it is said, is void, because of the death of Hazard L. Baldwin before its rendition, there being no suggestion of his death. The judgment was voidable, but not void. It was voidable at the instance of Hazard L. Baldwin's representatives. Until avoided by proceedings in error by his representatives, it is final both as to him and as to the other defendants. It is not even voidable by the other defendants, because, although erroneous, it is not erroneous to their prejudice.

Judgment affirmed.